FILED
AUG 3 1979
MICHAEL RUBAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-469

NORMAN B. OPPENHEIMER
Petitioner,

versus

ELECTRO-NUCLEONICS, INC.,
AVELINO FIEL
ESTATE OF ALFRED BERG, BERTHA
L. BERG AS EXECUTRIX
HAROLD WM. HARRISON
HERBIERTO FEBUS BERNARDINI
MARIANO CABRERA
CONBOY, HEWITT, O'BRIEN AND
BOARDMAN, ESQS., A PARTNERSHIP
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE SECOND CIRCUIT

NORMAN B. OPPENHEIMER
Pro se
Petitioner
1551 Second Avenue
New York, New York 10028
Phone: (212) 799-9680

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF FACTS 5

THE EVIDENCE 9

REASONS FOR GRANTING THE WRIT 17

CERTIFICATE 19

APPENDICES

A—Opinion of the United States Court of Appeals, Dated, April 4, 1979 ..... 1a

B—Judgment, dated September 13, 1978 ..... 5a

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

NORMAN B. OPPENHEIMER,
Petitioner,

versus

ELECTRO-NUCLEONICS, INC.,
AVELINO FIEL
ESTATE OF ALFRED S. BERG,
BERTHA L. BERG AS EXECUTRIX
HAROLD WM. HARRISON
HERBIERTO FEBUS BERNARDINI
MARIANO CABRERA
CONBOY, HEWITT, O'BRIEN AND
BOARDMAN, ESQS., A PARTNERSHIP,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

NORMAN B. OPPENHEIMER, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above cause on the 4th day of April, 1979.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is attached hereto as Appendix A, infra page 1a. The judgment of the United States District Court for the Southern District of New York, in these consolidated actions appears at Appendix B, infra page 5a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 4, 1979. Petitioner timely filed his Petition for Rehearing on the 12 day of April, 1979, said petition being denied by the Circuit Court of Appeals on the 14th day of May, 1979. The jurisdiction of the Supreme Court is invoked under Title 28, S1245 of the United States Code.

QUESTIONS PRESENTED

I. Whether the Court of Appeals by not making a determination of that part of petitioner's petition has sanctioned the Lower Court's departure from accepted judicial proceedings in not allowing petitioner a forum for a hearing of damages sustained against interpleader pursuant to 1969 decree of original Lower Court Judge, as ordered in these consolidated actions (?)

II. Whether the Court of Appeals by not making a determination of that portion of petitioner's petition has sanctioned the Lower Court's departure from accepted judicial proceedings wherein the Lower Court after trial went outside the record to public records in its determination of petitioner's entitlement of damages (?)

III. Whether the Court of Appeals by not making a determination of that portion of petitioner's petition has sanctioned the Lower Court's departure from accepted judicial proceedings which has prevented petitioner from proceeding with his complaint against certain defendant respondents, alleging their violations of 28 U.S.C. 1343 (?)

IV. Whether the Court of Appeals by not making a determination of that portion of petitioner's petition has sanctioned the Lower Court's departure from accepted judicial proceedings by enjoining petitioner from having any witnesses appear on his behalf at trial in these consolidated actions, against certain defendant-respondents therefore, denying, petitioner having a fair trial under the law (?)

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. (a). The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(2) the plaintiff has deposited such money or property or has paid the amount of or the loan

or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy. Title 28, U.S.C. 1335 (a) (2)

2. The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent; Title 28 S1343 (1) (2)

3. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property without due process of law, nor shall private property be taken for public use, without just compensation. U.S. Constitution Amendment V.

4. All personal property which is the object of commerce may be given as a pledge, provided it be capable of being possessed. Title 31 S5022 Laws of Puerto Rico.

5. As long as the thing in pledge is not taken by eminent domain, the debtor continues to be the owner thereof. Nevertheless, the creditor may exercise the actions which pertain to the owner of the thing pledged, in order to recover or defend it against a third person. Title 31 S5026 Laws of Puerto Rico.

6. A Creditor to whom the debt has not been paid at the proper time may proceed, before a notary, to alienate the pledge. This alienation must necessarily take place at public auction, and with the citation of the debtor and the owner of the pledge in proper case. If the pledge should not have been alienated at the first auction, a second one, with the same formalities, may be held, and should no result be attained the creditor may become the owner of the pledge. In such case, he shall be obliged to give a discharge for the full amount of his credit. Title 31 S5030 Laws of Puerto Rico.

STATEMENT OF FACTS

Petitioner Norman B. Oppenheimer was awarded a judgment of approximately $109,000 against four

defendants in September, 1978, after two trials in these consolidated actions, originally commenced as an alleged interpleader by respondent Electro-Nucleonics, Inc., in April, 1969 after they were served with a judgment and order rendered for petitioner in a lawsuit in District Court for Puerto Rico in March, 1969, which decreed that petitioner was always the owner of a registered stock purchase warrant No. W104 issued and delivered by Electro to petitioner, a former resident, then, of the Commonwealth of Puerto Rico in 1965. The warrant entitled petitioner the right to exercise said warrant to purchase the underlying shares of Electro's common stock.

The warrant became the subject of the lawsuit in the United States District Court for Puerto Rico, supra, after it had been stolen in 1965 by Benjamin Rodriquez (a judgment debtor in default in these consolidated actions) from respondent Herbierto Febus Bernardini (attorney in Puerto Rico, cousin to Rodriquez) who held it in escrow for the performance of a lease agreement between two Puerto Rican corporations.

From 1965 and thereafter, Electro was on notice with respect to petitioner's stolen property and his attempts to recover same, including the litigation commenced in Puerto Rico.

In February 1968, petitioner made his timely and lawful exercise of his warrant to Electro, which exercise was rejected in favor of respondent Avelino Fiel, whose exercise of the warrant was accepted by Electro, in turn all of the shares of the stock was issued and delivered by Electro to Fiel (including split shares stock) for further distribution to Alfred S. Berg (deceased, a former officer, director and general counsel to Electro, the Estate of Mr. Berg is a respondent) who received a part, the remainder of the shares were

held by Fiel's former counsel, for subsequent distribution to Rodriquez, his partner John Simak (brother-in-law to Fiel), and to other parties as shown in the record of trial.

The alleged interpleader complaint by Electro, included petitioner and Fiel as defendants, plus all of the parties named as defendants in the Puerto Rican action, supra (they never appeared nor answered the interpleader complaint and were never enjoined by the court). Electro in its complaint requested that petitioner be restrained as well as Fiel, however, the only party subsequently enjoined was petitioner, who was temporarily restrained pursuant to a signed ex parte order, which restrained petitioner and the *father* of Fiel, likewise the order to show cause and the complaint was served on Fiel's *father* pursuant to directions by Electro and their counsels who caused a settlement notice to be served on Fiel's *father*, which left Fiel free to trade, hypothecate and use the shares of stock, as directed by the various parties in this scheme to defeat petitioner's rights to his property.

The court in granting the injunction May, 1969, directed Electro's posting of security, and:

> "ORDERED, ADJUDGED AND DECREED, that the plaintiff be and it hereby is discharged from any and all further liability except to the party who the Court shall adjudge is entitled to execute Warrant No. W104;"

Petitioner served a complaint in 1970 against Electro and others, alleging that defendants there were all parties to a scheme to defeat petitioner's rights in the warrant, including, violations of 15 U.S.C. 77q (a) and 78j (b). The complaint was dis-

missed against Electro and their transfer agent on grounds that petitioner was in violation of the interpleader restraining order.

Prior to trial February 4 and 5, 1974, petitioner was enjoined by the court (assigned in 1972 for all purposes) from subpoenaing any witnesses to appear on his behalf at trial where the sole issue determined was the ownership of the warrant, which the court determined that: "the true owner of the warrant is Mr. Oppenheimer."

Petitioner's trial counsel thereafter, was granted permission to serve an amended complaint, which included violations of 28 U.S.C. 1343 (1) (2) (Civil Rights), as alleged against Electro, respondents Conboy, Hewitt, O'Brien and Boardman, Alfred S. Berg and Harold Wm. Harrison, however, the court prevented petitioner from proceeding against Electro, an appeal was taken to the Second Circuit Court of Appeals which denied the petition as being premature, that Court, directed the consolidation of both lawsuits.

Further permission was granted to petitioner's counsel to update and amend the complaint, thereafter, certain parties moved for and were granted summary judgment. This matter was the subject of an appeal to the Second Circuit Court of Appeals, which dismissed the petition with leave to file another notice after final judgment.

On December 30, 1975 trial was held to determine damages against Fiel and defendants in default, as well as petitioner's complaint against the remaining parties to his complaint, Bernardini and Mariano Cabrera. Again, permission to have witnesses subpoenaed to appear to testify for petitioner, was denied by the court.

Pursuant to the court's September 15, 1976 findings after trial, petitioner's complaint against Bernardini and Cabrera was dismissed and an award of damages was given to petitioner against Fiel and others, supra. Petitioner's motion to modify the award was denied, and final judgment was entered September 13, 1978.

A direct appeal was filed to the Second Circuit Court of Appeals and oral argument was heard on the 4th day of April, 1979. The decision of the Court of Appeals was to affirm the September, 1978 judgment. Said decision was issued in an order, dated April 4, 1979.

A petition for Rehearing was filed, pursuant to Rule 40, Federal Rules of Appellate Procedure, on April 12, 1979, said petition being denied by the Court of Appeals on May 14, 1979, whereupon, petitioner files this application for Writ of Certiorari in the United States Supreme Court.

THE EVIDENCE

The Court of Appeals, in its April 4, 1979 decision, refers to an opinion of the lower court of June 21, 1974, directive (order of the Court of Appeals, page 1). The 1974 opinion stated: "The plaintiff (Electro-Nucleonics, Inc) by order of the Court (Metzner, J.) entered May 22, 1969, was discharged from all further liability in the case, 'except to the party the Court shall adjudge is entitled to execute the warrant No. W104.' By the same order, the Court noted that the common stock warrant in issue had been deposited with the Clerk of the Court. It noted further that plaintiff had filed security in the amount of $25,000; as a result, defendants Fiel and Oppenheimer were enjoined from pur-

suing or instituting any other actions against plaintiff with respect to the ownership of and the right to exercise the warrant." When petitioner's counsel was thereafter denied a forum to determine petitioner's claims of damages against Electro, an appeal was taken and argued November 4, 1974 before the Second Circuit Court of Appeals, which dismissed the petition on grounds of being brought on prematurely. Petitioner, respectfully asserts, that after the final judgment was entered, supra, as part of his appeal to the Court of Appeals, the same petition was again raised, to determine petitioner's entitlement to his claims of damages against Electro, as mandated in the May 22, 1969 order, supra, and, this portion of petitioner's appeal, was undecided, by the Court.

The June 21, 1974 opinion clearly states that the court made no determination as to the merits of petitioner's claims for any damages against Electro at the February 4, 5, 1974 trial, that: "The only issue now before this court, and the only issue now decided, is the true owner of the warrant and shares issued pursuant thereto as between Fiel and Oppenheimer." Further, the opinion stated:

> 2. There is pending in this Court another action brought by Oppenheimer against plaintiff and others in which he alleges that defendants there were all parties to a scheme to defeat his rights in the warrant. *None of these issues is decided except as to Fiel as indicated.*
>
> 3. The issue of damages as to Fiel will be tried with the case *Oppenheimer* v. *Electro-Nucleonics, Inc., et al.*, 70 Civ. 5667. Oppenheimer may also be entitled to costs and counsel fees as against Fiel and/or others to be determined at the trial of 70 Civ. 5667 upon a showing of bad faith."

The court made no determination of the liability issue, or respondent's entitlements to costs and counsel fees, as against Electro, if any. No disposition was made on the issue of the bond, that was posted by Electro for possible damages, and clearly, from the record of trial, reserved those issues for the later trial, which was held December 30, 1975. However, the issues tried at that trial, were the claims against Bernardini and Cabrera, and the damages against Fiel and defendants in default in these consolidated actions.

The Court of Appeals was apprised by the record on the appeal taken November 4, 1974 by petitioner's counsel's affidavit:

> "15 That, the interpleader complaint *Electro-Nucleonics, Inc.*, v. *Oppenheimer 69 Civ 1616* defendant-appellee 'ELECTRO' prayer for relief included the following (*Appellant's Appendix p. 112, l. 7 thru 11 inclusive)*
> *'(f)* That upon the deposit into the registry of this Court of Warrant No. W104, the plaintiff herein be discharged from all liability in the premises *except to the party who the Court shall adjudge is entitled to execute Warrant No. W104;*
>
> 16. That, one Myron D. Cohen, an attorney associated with the defendant-appellee 'ELECTRO's' then counsel, Conboy, Hewitt, O'Brien and Boardman (defendants in this proceeding), by sworn affidavit, on April 17, 1969, in support of an application for an order to show cause, stated the following: (*Appellant's Appendix, p. 115, l. 25 thru 30 inclusive*)

'3. Requiring said defendants to show cause at a time and place to be fixed by the Court, why said order or injunction against them and each of them should not be made permanent, and why the plaintiff herein should not be discharged from any and all further liability *except to the party who the Court shall* adjudge is entitled to execute Warrant No. W104;

17. That, an order to show cause in the interpleader *Electro-Nucleonics* v. *Oppenheimer 69 civ. 1616*, was signed on April 23, 1969, by Judge Milton Pollack, which stated: (*Appellant's Appendix, p. 43, 1. 11 thru 15 inclusive*)

'ORDERED, that Warrant No. W104, deposited on April 18, 1969 in the Registry of this Court by plaintiff, be retained therein to abide the determination of this proceeding or the further order or decree of this Court with respect to the subject matter of the controversy:'

also (*Appellant's Appendix p.43, 1.24*)
'ORDERED, on conditioned that security is furnished pursuant to Rule 65 (c) in the amount of $25,000____ '

also (*Appellant's Appendix, p. 44 1. 6 thru 9 inclusive*)
'WHY the plaintiff herein should not be discharged from any and all further liability *except to the party who the Court shall adjudge is entitled to execute Warrant No. W104,* ____ '

19. The view expressed by dependent herein, that the appropriate forum for damages and other

relief sought against defendant-appellee 'ELECTRO' should also have been aired in the interpleader action (*Electro-Nucleonics* v. *Oppenheimer, 69 civ. 1616*), was shared by Alfred S. Berg (now deceased), then general counsel to defendant-appellee 'ELECTRO' (see *Appellant's Appendix, p. 208, 1. 21 thru 26 inclusive*):

'The proper forum for plaintiff to litigate any claim for damages against Electro-Nucleonics for failure to honor his purported exercise of the stock warrant should be in the interpleader action inasmuch as plaintiff had therein insisted that Electro-Nucleonics put up a bond to indemnify him against losses caused by its actions therein.' "

The record before the Court of Appeals, is quite clear with respect to petitioner's request that a determination of the issue with respect to the May 22, 1969 mandate of the lower court should be decided, and, petitioner strongly suggests that to date, this has not been determined.

·II.

Further, the Court of Appeals denied the appeal of petitioner with respect to his claim that the amount of the judgment obtained was too small (order of the Court of Appeals page 2). The court stated: "...and we hold that the finding of damages in the amount of approximately $109,000 ($25,000 of which is in the nature of punitive damages) is not clearly erroneous, nor indeed ungenerous."

The damages awarded petitioner after trial, in the September 15, 1976 findings by the court, referred to,

by the Court of Appeals (order of the Court of Appeals, page 1), determined: "In the court's view, the appropriate figure for the determination of damages should be obtained by taking the value of the stock (mean between the bid and offered prices) *on February 23, 1968,* ..."

Petitioner respectfully asserts that the record of trial on December 30, 1975, did not establish value as of February 23, 1968, and nowheres, either in the February 4, 5, 1974 trial or any document in the records in these consolidated actions was there any reference to valuation on February 23, 1968, and, undoubtedly, the court went beyond the record, to public records.

The transcripts of the December 30, 1975 trial, uncontroverted, warranted the establishment of damage of the value of the stock, either on July 15, 1968, or at minimum, on April 15, 1969 at pages 37 to 39, 102, which included respondent's exhibits '8' and '9' at trial, established respondent's contention of his entitlement to value as of July 15, 1968, and/or April 15, 1969.

The valuation determined as of July 15, 1968 was made part of the court's pretrial order, dated December 16, 1975.

Further, part of petitioner's appeal to the Court of Appeals with respect to his entitlement to interest on the value of the stock, whether it be determined, even as of February 23, 1968, was likewise part of the pretrial order, and was part of the trial record 39, 100, 102 and 105.

Petitioner would show, that using the July 15, 1968 date, it would be a true indication of the market value

at the earliest date that the stock could and would have been sold had Electro issued these unregistered shares to petitioner on February 23, 1968. Alternatively, on April 15, 1969, a registration statement filed by Electro with the Securities and Exchange Commission became effective, which included for the benefit of its "unregistered" shareholders, who sold over 82,000 shares of stock, and had these unregistered shares been issued to petitioner on February 23, 1968, they could have and would have been included in the registration statement, of those shareholders, similar in nature, as to petitioner.

Petitioner suggest that the Court of Appeals failed to determine petitioner's entitlement to proceed to trial with respect to his allegations against certain respondents of violations of his Civil Rights.

After the February 1974 interpleader trial, which had evidenced that petitioner was the victim of the fraud perpetrated upon him, and that the injunctive order was fraudulently obtained by Electro, May 22, 1969, supra, as shown by the evidence and facts in the transcript of the record at pages 1 and 54, the trial judge granted petitioner's counsel leave to amend the complaint in *Oppenheimer* v. *Electro-Nucleonics, Inc., et al.*, 70 Civ. 5667, supra, except as to Electro, the subject of the original appeal, supra. The amended complaint alleged violations of 28 U.S.C. 1343 (Civil Rights) by Electro and respondents Conboy, Hewitt, O'Brien and Boardman, Alfred S. Berg and Harold Wm. Harrison, plus updating the original allegations of fraud and violations of federal securities law by defendants.

Petitioner would argue that the Court of Appeals made no determination of the Civil Rights allega-

tions, which remains undecided, and, the order of the Court of Appeals, page 2, states:

> "Appellant challenges the dismissal of his action as against defendants Peat, Marwick and Mitchell & Co., Sterling, Grace Securities Corporation, and other defendants who participated in the filing of a Registration Statement with the Securities and Exchange Commission in 1969 for Electro-Nucleonics. The district judge justifiably found that appellant neither alleged nor proved that he either purchased or sold any of Electro's securities covered by that Registration Statement, and thus, for that reason among others, his claims under the securities laws fail."

IV

Finally, petitioner would show that the trials in these consolidated actions, were conducted with petitioner in restraint, that the trial judge in these consolidated actions, had enjoined petitioner in both the February, 1974 and December 30, 1975 trials which hindered petitioner from introducing the preponderance of evidence against defendants, and, that the petitioner, unable to subpeona default defendant Rodriquez,[1]/ resulted in the dismissal, after trial of respondents Bernardini and Cabrera. This restraint imposed by the court on petitioner, deprived him of the consti-

[1]/ Rodriquez was a defendant in the same jurisdiction, in a tax matter (unrelated to these actions) which was scheduled for trial, shortly after the December 30, 1975 trial. Petitioner's counsel urged the trial judge to permit this defendant to testify, which was denied by the court.

tutionally required rights to a fair trial with respect to due process, pursuant to the 5th Amendment to the U.S. Constitution.

Thus, the Court of Appeals affirmance of the trial court's findings that "appellant had failed to sustain his burden of proof of showing actionable fraud by these defendants against appellant, is not clearly erroneous." (The Court of Appeals order, page 2), the Court did not take into account that petitioner was enjoined from having any witnesses appear on his behalf, supra, and the only way to "sustain the burden" was to have testimony and documents at the trial, which would and could have further evidenced the entire fraud, conspiracy perpetrated upon petitioner by all the defendants, as alleged in petitioner's amended complaints.

REASONS FOR GRANTING WRIT

As cause for granting this Writ of Certiorari, your petitioner would show:

1. The Court of Appeals in not making any determination of petitioner's entitlement to a forum as mandated in the May 22, 1969 order, supra, contravenes Title 28, U.S.C. 1355 (a) (2), that, the decree is interlocutory and not final.

2. That the Court of Appeals has sanctioned a lower court's findings which was not on the trial record or in any part of the record, at anytime, with respect to valuation of the Electro stock on February 23, 1968, and that the record is clear and uncontroverted with respect to an award of damages and interest either on July 15, 1968, and/or April 15, 1969, for petitioner.

3. The petitioner is entitled to a trial against respondents as alleged in his amended complaint of violations of petitioner's Civil Rights, that the Court of Appeals made no determination with respect to that part of his petition and violates petitioner's rights under Title 28, U.S.C. 1343.

4. That the petitioner was deprived of a fair trial in February, 1974 and December, 1975, by enjoining petitioner from having any witnesses appear on his behalf at trial, that the Court of Appeals ruling upholding the dismissal of the complaint as against Bernardini and Cabrera, violated petitioner's rights under the 5th Amendment-due process of law.

WHEREFORE, your petitioner, NORMAN B. OPPENHEIMER, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in the above-captioned cause.

Respectfully submitted,

NORMAN B. OPPENHEIMER, pro se

NORMAN B. OPPENHEIMER, pro se
Petitioner
1551 Second Avenue
New York, New York 10028
Phone: 212-799-9680

STATE OF NEW YORK
COUNTY OF NEW YORK

GUILLERMO SEGARRA, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 448 Bolton Avenue, Bronx, New York 10473.

That, on the 17th day of September 1979, deponent served the within Petition for Writ of Certiorari, upon the parties or attorneys of record herein by depositing the same in the United States mail in envelopes properly addressed to each of them and with sufficient first class postage affixed, as follows:

Berg & Duffy
300 Marcus Avenue
Lake Success, New York 11042

Attorneys for Respondents

ELECTRO-NUCLEONICS, INC.,
BERTHA L. BERG, EXECUTRIX

For THE ESTATE OF ALFRED S. BERG

AVELINO FIEL, pro se
24-14 East 12th Street
Brooklyn, New York

D'Amato, Costello & Shea
116 John Street
New York, New York 10038

Attorneys for Respondents
CONBOY, HEWITT O'BRIEN & BOARDMAN

HAROLD WM. HARRISON, pro se
10 Grace Ave.
Great Neck, New York

FRED J. HALSEY, JR.
213 East 49th Street
New York, New York 10017

Attorney for Respondents
HERBIERTO FEBUS BERNARDINI
MARIANO CABRERA

DATED: NEW YORK, NEW YORK
1979

Sworn to before me this date

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of April, one thousand nine hundred and seventy-nine.

Present:

HONORABLE LEONARD P. MOORE
HONORABLE WILFRED FEINBERG
HONORABLE THOMAS J. MESKILL

Circuit Judges,
NORMAN B. OPPENHEIMER,
Plaintiff-Appellant,

—against—

ELECTRO-NUCLEONICS, INC., et al.
Defendants-Appellees.

ELECTRO-NUCLEONICS, INC.,
Plaintiff,

—against—

NORMAN OPPENHEIMER, et al.,
Defendants.

Appeals from the United States District Court for the Southern District of New York

---

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by appellant pro se and by counsel for appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

This is an appeal by plaintiff from a judgment in plaintiff's favor of approximately $109,000 against four defendants, entered by Judge Constance Baker Motley in the United States District Court for the Southern District of New York. The action was dismissed as against numerous other defendants. Judge Motley wrote three opinions, dated June 21, 1974, July 31, 1975 and September 15, 1976. Appellant challenges the dismissals and also claims that the amount of the judgment obtained is too small.

The case has its origin in a 1965 lease transaction in Puerto Rico, wherein appellant endorsed a warrant for the purchase of Electro-Nucleonics, Inc. stock in blank and delivered it as security. His signature was not guaranteed by a bank, however, which appellant knew was required for effective transfer, as Judge Motley found. After the lease transaction soured, appellant sought to get the warrant back, but it had already been delivered to one Fiel, a defendant in this action. When both appellant and Fiel sought to exercise the warrant, Electro-Nucleonics brought the instant interpleader action, which was subsequently

consolidated with an action brought by appellant concerning the same subject matter.

Appellant challenges the dismissal of his action as against defendants Peat, Marwick and Mitchell & Co., Sterling, Grace Securities Corporation, and other defendants who participated in the filing of a Registration Statement with the Securities and Exchange Commission in 1969 for Electro-Nucleonics. The district judge justifiably found that appellant neither alleged nor proved that he either purchased or sold any of Electro's securities covered by that Registration Statement, and thus, for that reason among others, his claims under the securities laws fail.

Appellant challenges the vacatur of default judgments that had been entered against defendants Mariano J. Cabrera and H. Febus Bernardini, and the dismissal of the complaint as against them. We find no abuse of discretion in Judge Motley's vacatur of the default judgments, and also hold that the district court's finding, that appellant had failed to sustain his burden of proof of showing actionable fraud by these defendants against appellant, is not clearly erroneous.

Appellant argues that the amount of the judgment entered in his favor against four of the defendants is too low, and that the amount should have been approximately $243,000, allegedly the highest value of the stock subject to the warrant between the time of issuance of the warrant and the time appellant ultimately re-obtained the warrant when he won the interpleader action. We agree with the district judge that to enter judgment in that amount on these facts would be too speculative, and we hold that the finding of damages in the amount of approximately $109,000 ($25,000 of which is in the nature of punitive damages) is not

clearly erroneous, nor indeed ungenerous. The district judge pointed out that if plaintiff could in fact have realized a greater amount from the warrant, had it not been tied up in litigation, he caused much of the difficulty himself by dealing with the warrant in the lease transaction in such a way as to create the confusion that resulted in all the litigation that then inevitably followed.

Appellant has raised other issues, which we find upon due consideration to be without merit. We affirm the judgment of the district court in all respects.

LEONARD P. MOORE

WILFRED FEINBERG

THOMAS A. MESKILL

Circuit Judges

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Judgment #78,1252

ELECTRO-NUCLEONICS, INC., Plaintiff

69 Civ. 1616 (CBM)

versus

NORMAN OPPENHEIMER, AVELINO FIEL, MARIANO CABRERA, CESAR J. FEBUS BERNARDINI, and MADRID HOTEL CORPORATION, Defendants

NORMAN B. OPPENHEIMER, Plaintiff

70 Civ. 5667 (CBM)

versus

ELECTRO-NUCLEONICS, INC., REGISTRAR and TRANSFER AGENT OF NEW JERSEY, BERTHA L. BERG AS EXECUTRIX OF THE ESTATE OF ALFRED S. BERG, DECEASED, HAROLD WM. HARRISON, BENJAMIN RODRIQUEZ, HERBIERTO FEBUS BERNARDINI, MADRID HOTEL CORPORATION, MARIANO CABRERA, CESAR FEBUS BERNARDINI, AVELINO FIEL, JOHN J. NEWGARD, RICHARD ABAJIAN, VINCENT ABAJIAN, DR. JOHN O. HERSHEY, ROY B. SNAPP, RAY A. KROC, WALTER M. CAROW, PEAT, MARWICK AND MITCHELL AND CO., STERLING GRACE SECURITIES CORPORATION, AND CONBOY, HEWITT, O'BRIEN and BOARDMAN, A PARTNERSHIP, Defendants

The above entitled actions having been consolidated by the Order of the Court of Appeals for the Second Circuit, filed November 12, 1974, so ordered, by Honorable Constance Baker Motley, United States District Judge, dated December 16, 1974, filed December 17, 1974, (EXHIBIT "A"), and it was

Decided that plaintiff ELECTRO-NUCLEONICS, INC. in 69 Civ. 1616 was discharged from any and all further liability, except to the party who the Court shall adjudge is entitled to exercise Warrant No. W104, dated and so ordered by Honorable Charles M. Metzner, United States District Judge, May 13, 1969 (EXHIBIT "B"), and it was

Decided that the complaint of plaintiff NORMAN B. OPPENHEIMER, in 70 Civ. 5667, as against defendants ELECTRO-NUCLEONICS, INC., and REGISTRAR AND TRANSFER AGENT OF NEW JERSEY, was dismissed by Honorable Marvin E. Frankel, United States District Judge, dated and so ordered March 15, 1971 (EXHIBIT "C") and it was decided

After a non-jury trial which was held on February 4th and 5th, 1974 in the 69 Civ. 1616 before Honorable Constance Baker Motley, defendants NORMAN OPPENHEIMER and AVELINO FIEL appearing, no other defendants appearing, after trial, the Court adjudged defendant NORMAN OPPENHEIMER was the rightful owner of the common stock purchase Warrant No W104 and had the right to exercise same for the purchase of the common stock of plaintiff ELECTRO-NUCLEONICS, INC. dated and so ordered, June 21, 1974 (EXHIBIT "D") and

The Court decreed that defendant NORMAN OPPENHEIMER was entitled to the possession of 6,750 shares of common stock of plaintiff ELECTRO-NUCLEONICS, INC., defendant AVELINO FIEL was not entitled to any part of the 6,750 shares of stock now declared owned by NORMAN OPPENHEIMER, and, AVELINO FIEL was directed to surrender to plaintiff ELECTRO-NUCLEONICS, INC. 4,500 shares of common stock of ELECTRO-NUCLEONICS, INC. for

cancellation, and, plaintiff ELECTRO-NUCLEONICS, was directed to return to AVELINO FIEL all moneys tendered by him in the exercise of WARRANT NO. W104, and subject to collection of a check given in payment by defendant NORMAN OPPENHEIMER to ELECTRO-NUCLEONICS, INC. shall then issue and deliver to defendant NORMAN OPPENHEIMER, 6,750 shares of common stock of ELECTRO-NUCLEONICS, INC., dated and so ordered June 21, 1974 (EXHIBIT "E"), and it was

Previously decided that plaintiff NORMAN B. OPPENHEIMER in 70 Civ. 5667 was granted leave to file and serve an amended complaint except as to defendants ELECTRO-NUCLEONICS, INC. and REGISTRAR AND TRANSFER AGENT OF NEW JERSEY, dated and so ordered August 27, 1974 (EXHIBIT "F"), thereafter

In the above consolidated actions, the Honorable Constance Baker Motley, decreed to dismiss the complaint and for summary judgment of defendants PEAT MARWICK AND MITCHELL AND CO., STERLING GRACE SECURITIES CORPORATION, CONBOY, HEWITT, O'BRIEN and BOARDMAN, A PARTNERSHIP, HAROLD WM. HARRISON, BERTHA L. BERG AS EXECUTRIX OF THE ESTATE OF ALFRED S. BERG, DECEASED, JOHN J. NEWGARD, RICHARD ABAJIAN, VINCENT ABAJIAN, JOHN O. HERSHEY, ROY B. SNAPP AND WALTER M. CAROW, dated and so ordered July 31, 1975, filed October 28, 1975 (EXHIBIT "G"), and

On December 30, 1975, a one day trial was held in these two consolidated actions, without a jury, counsel appearing for NORMAN B. OPPENHEIMER, and counsels for defendants AVELINO FIEL, HERB-

IERTO FEBUS BERNARDINI and MARIANO CABRERA argued and the remaining party defendants BENJAMIN RODRIQUEZ, MADRID HOTEL CORPORATION and CESAR FEBUS BERNARDINI did not appear before Honorable Constance Baker Motley, default judgment previously was entered as against them on November 15, 1974, after trial, decision was reserved, thereafter, findings of fact and conclusions of law dated and so ordered September 15, 1976, (EXHIBIT "H") and

It was decreed that these two consolidated actions be discontinued, dated and so ordered September 17, 1976, filed September 22, 1976, (EXHIBIT "I") thereafter

Plaintiff Norman B. Oppenheimer motion to amend the findings of fact and conclusions of law, September 15, 1976, denied, dated and so ordered May 10, 1978, (EXHIBIT "J")

That, defendant RAY A. KROC, in these consolidated actions by motion to dismiss complaint, granted, dated and so ordered May 12, 1978, filed May 16, 1978, therefore

Upon the findings of fact and conclusions of law, dated and so ordered September 15, 1976, it is

ORDERED ADJUDGED and DECREED that the Order of discontinuance signed by Honorable Constance Baker Motley, of September 17, 1976, filed September 22, 1976 is hereby vacated, and it is further

ORDERED ADJUDGED and DECREED that the plaintiff's NORMAN B. OPPENHEIMER complaint in these two consolidated actions against defendants HERBIERTO FEBUS BERNARDINI and MARIIANO CABRERA are dismissed, and that they have judgment against plaintiff NORMAN B. OPPENHEIMER dismissing the complaint, and it is further

ORDERED ADJUDGED and DECREED that plaintiff NORMAN B. OPPENHEIMER is awarded damages determined as on February 23, 1968, in the amount of $109,125.00. deducting $25,000.00, totaling $84,125.00, against defendants AVELINO FIEL, BENJAMIN RODRIQUEZ, CESAR FEBUS BERNARDINI and MADRID HOTEL CORPORATION, jointly and severally, and it is further

ORDERED ADJUDGED and DECREED that plaintiff NORMAN B. OPPENHEIMER is awarded punitive damages in the amount of $25,000.00, against defendants AVELINO FIEL, BENJAMIN RODRIQUEZ, CESAR FEBUS BERNARDINI and MADRID HOTEL CORPORATION, jointly and severally, and it is further

ORDERED ADJUDGED and DECREED that plaintiff NORMAN B. OPPENHEIMER is entitled to the taxable costs against defendants AVELINO FIEL, BENJAMIN RODRIQUEZ, CESAR FEBUS BERNARDINI and MADRID HOTEL CORPORATION, jointly and severally.

Dated September 13, 1978

New York, New York

CONSTANCE BAKER MOTLEY
UNITED STATES
DISTRICT JUDGE

Judgment Entered
September 13, 1978

CLERK OF THE COURT